



## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government – This bill increases government by adding additional responsibilities to each agency IG as well as the CIG.

#### B. EFFECT OF PROPOSED CHANGES:

##### Current situation

##### **Agency Inspectors General**

Section 20.055 (2), F.S., establishes the Office of the Inspector General (OIG) in each state agency to promote accountability, integrity, and efficiency in government. Each IG is appointed, supervised, and removed by their respective agency head. The major responsibilities of the OIG include investigations, audits, and reviews of state agency programs and activities.

Section 20.055 (6), F.S., states that investigations are designed to detect, deter, prevent, and eradicate fraud, waste, mismanagement, misconduct, and other abuses in state government. Accordingly, the following duties are performed by OIG:

- Receive complaints and coordinate all activities of the agency as required by the Whistleblower's Act pursuant to ss. 112.3187-112.31895, F.S.
- Receive and consider the complaints which do not meet the criteria for an investigation under the Whistle-blower's Act and conduct, supervise, or coordinate such inquiries, investigations, or reviews as the IG deems appropriate.
- Report expeditiously to the Department of Law Enforcement or other law enforcement agencies, as appropriate, whenever the IG has reasonable grounds to believe there has been a violation of criminal law.
- Conduct investigations and other inquiries free of actual or perceived impairment to the independence of the IG or the IG's office. This shall include freedom from any interference with investigations and timely access to records and other sources of information.
- Submit in a timely fashion final reports on investigations conducted by the IG to the agency head, except for whistle-blower's investigations, which shall be conducted and reported pursuant to s. 112.3189, F.S.

Audits are independent appraisals designed to examine and evaluate agency programs and activities. An inherent objective when performing audits is to review and evaluate internal controls necessary to ensure fiscal accountability. Audits must be conducted in accordance with the current Standards for the Professional Practice of Internal Auditing and subsequent Internal Auditing Standards or Statements on Internal Auditing Standards published by the Institute of Internal Auditors, Inc., or, where appropriate, in accordance with generally accepted governmental auditing standards.

Final reports are submitted to the agency head and the Auditor General, whose office is directed to give official recognition to their findings and recommendations as part of its post-audit responsibilities.

Section 20.055(5)(d), F.S., provides that at the conclusion of each audit, the inspector general must submit preliminary findings and recommendations to the person responsible for supervision of the program function or operational unit who must respond to any adverse findings within 20 working days after receipt of the tentative findings. Such response and the inspector general's rebuttal to the response must be included in the final audit report. The inspector general must submit the final report to the agency head and to the Auditor General.

After audit reports are issued, a follow-up review is performed six months later to determine the extent of corrective actions implemented by management. Audits may be classified as either financial, compliance, performance, or data and information security.

### **Chief Inspector General**

Section 14.32, F.S., creates the Chief Inspector General (CIG) who serves as the inspector general for the Executive Office of the Governor. The CIG is responsible for promoting accountability, integrity, and efficiency in the agencies under the jurisdiction of the Governor, and is appointed by and serves at the pleasure of the Governor. The duties of the CIG include:

- Undertaking investigations and recommending policies designed to deter, detect, prevent, and eradicate fraud, waste, abuse, mismanagement, and misconduct in government;
- Investigating any administrative action of any agency under the direct supervision of the Governor;
- Examining the records and reports of any agency under the supervision of the Governor;
- Coordinating complaint-handling activities with agencies;
- Coordinating the activities of the Whistle-blower's Act pursuant to ch. 112, F.S., and maintaining the Whistle-blower's hotline to receive complaints and information concerning the possible violation of statutory law or administrative rules, mismanagement, fraud, waste, abuse of authority, malfeasance, or a substantial or specific danger to the health, welfare, or safety of the public;
- Working with the Department of Law Enforcement, the Department of Legal Affairs, and other law enforcement agencies when there are recognizable grounds to believe that there has been a violation of criminal law or that a civil action should be initiated;
- Acting as liaison with outside agencies and the Federal Government to promote accountability, integrity, and efficiency in state government;
- Acting as liaison and monitoring the activities of the inspectors general in the agencies under the Governor's jurisdiction;
- Reviewing, evaluating, and monitoring the policies, practices, and operations of the Executive Office of the Governor; and
- Conducting special investigations and management reviews at the request of the Governor.

### **The Council on State Agency Inspectors General**

On January 26, 2005, the Office of the Inspector General of the Florida Department of Children and Families (DCF) released its report on investigation 2004-0080. The report contained four allegations, which were deemed supported, about actions taken by the executive director of Hillsborough Kids, Inc. On April 29, 2005, the Secretary of DCF requested that the CIG conduct an independent review of the 2004-0080 investigation. The CIG Report on Case# 200504290005 was released on July 28, 2005, and determined that the DCF report contained findings without sufficient evidence to support the allegations that the executive director violated any law, rule, regulation, or policy. The CIG report also made recommendations specific to procedures in the Office of the Inspector General of DCF.

Spurred largely by this series of events, the Legislature during the 2006 Regular Session created the Council on State Agency Inspectors General (council) at s. 14.235, F.S., for the purpose of developing recommendations relating to the creation of an independent review process for investigations and audits conducted by state agency inspectors general. The council consisted of the CIG and inspector generals from the Office of the Attorney General, Agency for Workforce Innovation, Department of Business and Professional Regulation, and Fish and Wildlife Conservation Commission. Section 14.235(7), F.S., required that the review process developed and recommended by the council must:

- offer entities contracting with state agencies and individuals substantially affected by the findings, conclusions, or recommendations a meaningful opportunity to challenge in writing the findings, conclusions, and recommendations contained in a state agency inspector general's final report;
- specifically identify the entities and individuals entitled to submit a response, and identify the circumstances under which the entity's response must be attached to the state agency inspector general's final report;
- provide a hearing process entitling entities contracting with state agencies and individuals substantially affected by the findings, conclusions, or recommendations with an opportunity to present to the CIG any additional material relevant to the state agency inspector general's final report. The review process must permit the CIG to independently investigate the state agency inspector general's report and the original investigation; and
- identify ancillary issues including public records concerns, special conditions for whistle-blower's investigations, and exemptions for specific categories of audits or investigations.

### **The Association of Inspectors General**

The Association of Inspectors General (association) is a nonprofit organization that “seeks to foster and promote public accountability and integrity in the general areas of prevention, examination, investigation, audit, detection, elimination and prosecution of fraud, waste and abuse, through policy research and analysis; standardization of practices, policies, conduct and ethics; encouragement of professional development by providing and sponsoring educational programs; and the establishment of professional qualifications, certifications, and licensing.”

The association publishes General Principles and Standards for Offices of Inspector General (standards); the most recent revision is dated May 2004. The standards published by the association include:

- Statement of Principles
- Quality Standards for Offices
- Quality Standards for Investigations
- Quality Standards for Inspections, Evaluations, and Reviews
- Quality Standards for Audits

The association states in the introduction to the standards that offices of inspector general adopt the standards for their use with a statement that they are adopted “insofar as they do not conflict with statute, regulation, executive order, or other policy of this office.”

### **Effect of Proposed Changes**

HB 165 makes substantial changes to s. 20.055, F.S. The bill requires each IG at the conclusion of any audit of a program or contract that involves an entity contracting with the state, to submit

preliminary findings and recommendations to that entity. The entity must then respond within 20 working days to any adverse findings in the audit. Similarly, the bill requires that each IG, at the conclusion of an investigation that involves an entity contracting with the state, or an individual substantially affected, to submit its findings to the entity or affected individual. In turn the entity or individual must respond within 10 days to adverse findings in the investigative report. Responses to adverse findings and the IG's rebuttal, if any, are to be included in the final IG report.

Under the bill, each IG, under the Governor's jurisdiction, must report to the CIG all written complaints or alleged misconduct concerning the office of the IG or its employees.

For agencies under the jurisdiction of the Governor, the CIG must:

- receive complaints against agency inspectors general, and investigate those complaints "as the CIG considers appropriate."
- develop policies and procedures for reviewing such complaints, to include exemptions from the process, which afford affected entities and individuals a meaningful opportunity to express their complaint and present additional material. The policies and procedures developed under the bill are not required to be subject to the rulemaking requirements of the Administrative Procedure Act.
- distribute the report of any CIG investigation to the inspector general of the state agency, agency head of the subject's employing agency, and the person that filed the complaint against the inspector general.

HB 165 also requires the subject agency to reimburse attorney's fees and cost, up to \$50,000 incurred by entities contracting with the state or individuals substantially affected by an IG's findings, conclusions, and recommendations if, after an informal hearing, the IG's adverse findings are found to be not substantially justified. The bill does not define "substantially justified." The bill directs that the informal hearing be conducted by a hearing master selected by agreement of the state agency and CIG.

The bill provides new definitions to subsection (1), and modifies the definition of "agency head," providing that the agency head is a public official, and specifying that the term does not include the heads or officers of a private entity operating as a for-profit or non-profit entity. The bill further provides definitions for "individuals substantially affected," "entities contracting with the state," "additional material relevant," and "original investigation."

HB 165 requires agency inspectors general to comply with the General Principles and Standards for Offices of Inspector General as published and revised by the Association of Inspectors General. The bill further requires that when a director of auditing, and not the agency inspector general, performs an audit, the audit must be in accordance with current International Standards for the Professional Practice of Internal Auditing as published by the Institute of Internal Auditors, Inc.

In addition, the bill requires that the CIG be notified in writing before the hiring or termination of an agency inspector general, for those agencies under the direction of the Governor.

#### C. SECTION DIRECTORY:

Section 1. Amends s. 20.055, F.S., to require agency inspectors general and the Chief Inspector General to fulfill certain duties and responsibilities.

Section 2. Provides an effective date of July 1, 2008.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

### D. FISCAL COMMENTS:

In a coordinated analysis submitted on behalf of all agency inspectors general and the CIG, their analysis showed that the fiscal impact of HB 165 ranges from \$5,229,744 (assuming 10% percent request a hearing) to \$47,067,696 (assuming 90% request a hearing). Based on agency estimates of the number of hours needed for staff to complete the hearing process, an estimated 8 to 72 additional FTEs was projected. The impact on the CIG was estimated to range from \$57,600 (assuming the investigation of complaints against 1% of employees) to \$1,075,200 (assuming the investigation of complaints against 20% of employees). Additional FTEs required to perform the additional duties of the CIG were estimated to be between 1 and 8.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to require the counties or cities to spend funds or take action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

This bill may violate the Separation of Powers Doctrine by unlawfully delegating legislative authority. Article II, section 3 of the Florida Constitution, provides, “[n]o person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.” Under the Separation of Powers Doctrine, fundamental and primary policy decisions shall be made by the Legislature and administration of legislative programs must be pursuant to some minimal standards and guidelines ascertainable by reference to the enactment establishing the program. The Court reasoned, “[w]hen legislation is so lacking in guidelines that neither the agency nor the courts can determine whether the agency is carrying out the intent of the [L]egislature in its conduct, then, in fact, the agency becomes the lawgiver rather than the administrator of law.”

The bill requires the CIG to develop policies and procedures for reviewing complaints against an IG or its employees under the jurisdiction of the Governor. These policies and procedures further require the CIG to identify exemptions from this review process; however, the bill gives no guidance as to what specific categories of investigations will be exempt from the review process. As a result, the CIG will have the authority to decide what specific categories are exempt without guidance or direction from the Legislature.

B. RULE-MAKING AUTHORITY:

The bill requires the CIG to develop policies and procedures to afford entities contracting with the state and individuals who have been substantially affected by an IG’s adverse findings the opportunity to express their complaint and present additional evidence. Although the bill provides that these policies and procedures are not subject to rulemaking under ch. 120, F.S., these policies and procedures will have an effect on persons other than agency personnel (i.e. entities contracting with the state and individuals substantially affected) and would likely meet the definition of a “rule” under the Administrative Procedures Act (APA). The APA is the only means to provide public input and legislative guidance in statutory implementation, by the executive branch, of new duties and authority. By exempting the CIG from the provisions of APA, the review process to be created can be established without the consideration of public input or comment.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

D. STATEMENT OF THE SPONSOR

This bill adds fairness to due process.

**IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES**

Not applicable.